IN THE

Supreme Court of the United States

1109

No. —— October Term, 1941

EDWARD MONTGOMERY,
Petitioner-Defendant

vs.

UNITED STATES OF AMERICA,
Plaintiff-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

JACOB WEINSTEIN
742 Real Estate Trust Bldg.,
Philadelphia, Pa.,
Attorney for Petitioner.

MICHAEL SERODY, ESQ.,
Of Counsel,
1217 Bankers Securities Bldg.,
Philadelphia, Pa.

Murrelle Printing Company, Law Printers, 201-203 Lockhart St., Sayre, Pa.
Joseph M. Mitchell, Philadelphia County Representative, 5738 Thomas Avenue, Philadelphia, Pa.

INDEX

MISCELLANEOUS

IN THE
SUPREME COURT OF THE UNITED STATES

No. —— October Term, 1941

Edward Montgomery
Petitioner-Defendant
vs.
United States of America
Plaintiff-Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Edward Montgomery, in support of the petition for a certiorari, to be directed to the United States Circuit Court of Appeals for the Third Circuit, to review a judgment rendered the sixth day of March 1942, which affirmed the judgment and sentence of the United States District Court for the District of New Jersey entered the 11th day of July 1941, respectfully shows:

A.

SUMMARY STATEMENT OF THE MATTER INVOLVED

1. That on the 28th day of March 1939, the Grand Jury of the United States inquiring for the District of New Jersey, returned an indictment against your petitioner and others being No. 8728 B in that District, alleging and charging, that your petitioner and said other persons, with the crimes of violating sections 1184, 1162, 1185 and 1441 of title 26 U.S.C.A., of defrauding the United States of tax, possessing an unregistered still, fermenting mash and removing, etc. the still spirits for which the tax remained unpaid.

2. At the third trial of the cause held on May 14-15, 1941 at Camden, New Jersey, before the Honorable John Boyd Avis, D. J., evidence was introduced by both sides which tended to establish the following facts:

That some considerable time prior to February 4, 1937, the defendant, Michael Giannini, for principals whose identity was not revealed, set up and operated an illegal still at Bellmawr, New Jersey, which produced bootleg whiskey for general consumption, some of which was sold by Giannini to the petitioner-defendant, Edward Montgomery, who was a distributor of such whiskey in the southwestern part of the City of Philadelphia. Giannini, the defendant Michael DeLeone and his brother, Leo DeLeone, all living in the same general neighborhood with the petitioner-defendant, Edward Montgomery, in that section of the city.

The Government's evidence tended to prove that for some undisclosed reason the Bellmawr operations terminated, so that a short time prior to the 4th day of February,

1937, the defendant Hoffman and petitioner-defendant Montgomery, conceived a plan to set up another illegal still in New Jersey, reasonably close to Philadelphia, and to that end Montgomery delegated Hoffman to procure the cooperation of the defendant Giannini, who in turn should employ the defendants, Vitullo, DeStifano and Sacripanti, some related to Giannini and all his former employees in the Bellmawr enterprise. Giannini found the proposed project acceptable and accordingly a search was begun for a practical site. The evidence leaves some doubt as to who discovered the site but it is plain that such a locale was discovered. This was the so-called Hovis Farm located in Glouster Township, Camden County, New Jersey, being owned by a farmer named George B. Hovis, a co-indictee herein, who died prior to the present trial. In order to facilitate the erection and operation of the project on the Hovis Farm, the defendant Giannini, as his residence rented another farm about a mile distant from the Hovis place, known as the Borinquin Farm, to which Giannini removed his family from Bellmawr. There is no evidence that the petitioner-defendant ever visited either farm or was ever in New Jersey while any of the alleged illegal acts or omissions were under way, it being the Government's theory, predicated on Giannini's testimony, that Montgomery was the financial angle who set the transaction in motion, supervision of the enterprise upon the ground being the task of the defendant Hoffman. The petitioner-defendant, Montgomery, admitted that there were financial dealings between himself and the defendant Giannini, which took the form of loans by the former to the latter, and that he made purchases of whiskey from time to time from Giannini, but that he had no knowledge of the origin of such whiskey and that aside from this he was in no manner interested or concerned in Giannini or the Hovis Farm.

The evidence fails to show that Montgomery, the petitioner-defendant, ever purchased or had the opportunity of receiving any of the Hovis Farm product, because the operations there were relatively short lived, for the reason that on February 4, 1937, the Hovis Farm was raided and the still seized by Government agents, incidental to which, at least Giannini, DeStifano, Vitullo and Sacripanti were arrested on the ground, but the petitioner-defendant, Montgomery, was never arrested in these alleged offenses until about eighteen months after the raid.

In this eighteen month interval, Giannini made many visits to Montgomery at the latter's home in Philadelphia for the principal purpose of obtaining money from Montgomery, which purpose succeeded on several occasions, in the form of obtaining loans which remained unpaid, and when these visits as they finally did turn out to be financially unproductive, Giannini declared to Montgomery that he Giannini, if no more money was forthcoming, would put Montgomery in the case; viz.: that Giannini would turn informer. It also appears in the evidence incidental to one of Giannini's unsuccessful quests for money at the Montgomery home, that one of Mrs. Montgomery's diamond rings disappeared which later turned up in a Philadelphia pawn shop.

It is also inferable that when Montgomery finally declined to give more money to Giannini, he did turn informer in consequence of which at that belated period Montgomery was ultimately arrested and indicted on the strength of Giannini's information.

Giannini, being a confessed accomplice, the Government realizing the need for corroboration thereupon produced another co-indictee, the defendant, Michael DeLeone to corroborate Giannini. Thereafter Leo DeLeone, brother of Michael DeLeone was called as a rebuttal witness, and

his testimony, in substance and effect, was that Montgomery warned Michael DeLeone to avoid implication by staying away from the Hovis Farm, and that Michael DeLeone then tried to induce Montgomery to take steps to procure the release of the other defendants who were then in custody, which Montgomery agreed to do after a short time had elapsed.

In the cross examination of Leo DeLeone, for the purpose of impeachment, Montgomery's counsel endeavored to elicit from Leo DeLeone, that Leo had been convicted of a misdemeanor for the desertion of his wife and children in Philadelphia, which cross-examination the learned trial judge declined to permit.

During the examination of the petitioner-defendant, Montgomery in order to show bias of the Government's mainstay, Michael Giannini, Montgomery testified that about a month before the first trial of this case, Montgomery had occasion to be in the neighborhood of Eighth and Wharton Streets, in Philadelphia. That upon this occasion he was sitting in his automobile in conversation with his co-defendant, Joseph Hoffman, and while this was proceeding the defendant, Michael Giannini, after walking south on Eighth Street first engaged in a brief conversation with Hoffman in which Montgomery did not participate. This silence apparently irked Giannini to the point of making him angrily inquire of Montgomery what ailed Montgomery and if Montgomery thought that he was better than Giannini, in response to which Montgomery said that he wanted nothing whatever to do with him. This brought on a violent quarrel between them which culminated in a fist fight in the course of which Giannini drew a revolver and attempted to use it, but for the intercession of Hoffman and a third man named Angelo, who separated the combatants and hustled Giannini away in Hoffman's automobile. Montgomery main-

tained both in direct and cross examination that this fracas was merely a coincidence and not the result of an antecedent arrangement for a meeting between the persons involved.

To neutralize the narrative under claim of rebuttal the Government recalled Michael Giannini and over objection tried to prove that this meeting had been arranged by Montgomery to enable him to suborn Giannini by paying Giannini to testify falsely.

At the conclusion of the evidence upon a charge, Avis, D. J., which was not excepted to, the jury returned a verdict of guilty on counts one and two and not guilty on count three against the petitioner-defendant, Montgomery, and on all counts against Hoffman in consequence of which sentence was imposed on July 11th, 1941, on count one of the indictment, upon which a fine of $500.00 and eighteen months' custody of the Attorney General etc., was imposed, and on count two of the indictment a fine of $500.00 and penalty of $500.00 and eighteen months' custody of the Attorney General was imposed, said terms of imprisonment to run concurrently, making eighteen months in all, and to stand committed until the fines were paid. Count one charging the violation of title 26, section 1184 and count two charging violation of title 26 section 1162. Seasonable motions in arrest of judgment and for a new trial were filed May 19, 1941 which motions were denied on June 23, 1941, which memorandum opinion has been printed in full in the record herein.

Thereafter the 14th day of July, 1941, notice of appeal and assignments of error were duly filed.

3. The petitioner thereupon on the 14th day of July, 1941, duly perfected his appeal to the United States Court of Appeals for the Third Circuit, where the appeal was identified as of October term, 1941 No. 7847.

4. That thereupon after sundry proceedings in the said cause, the same was argued in the United States Court of Appeals for the Third Circuit (Coram Clark, Jones Cir. JJ and Ganey DJ) which tentatively affirmed the said judgment and sentence against the petitioner on the sixth day of January, 1942 by opinion filed per Jones, Circuit Judge, on said date (Record p. 29).

5. That by reference to the said opinion of the said Court filed on said sixth day of January 1942 aforesaid, it will inter alia appear pertaining and concerning the contention of the petitioner in regard to certain proposed cross examination of the Government's witness Leo DeLeone, that the said Circuit Court of Appeals determined and adjudicated as follows:

> "Finally, the appellant argues that the trial court erred in refusing him leave to impeach the credibility of a government witness by showing that the latter has been convicted of a misdemeanor in Pennsylvania for deserting his wife and children. In stressing this point the appellant apparently conceives that the matter is to be determined by the current law of New Jersey, the situs of the federal forum. In this he is mistaken. Long ago the Supreme Court said that 'the law by which * * * the admissibility of the testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789.' United States vs. Reid, et al., 53 U. S. (12 How.) 361, 363. The present question, therefore, is to be resolved, not by the law of New Jersey as it exists today, but by the law of New Jersey as it existed in 1789 and by any rules of evidence since enacted by the Congress or adopted by federal courts from the common law as being applicable in the administration of federal criminal statutes.

See Melaragno v. United States, 88 F. 2d 264, 265 (C.C.A. 3).

There was no statute in New Jersey prior to 1789 with respect to impeaching the credibility of a witness by showing his prior conviction of crime, and no early decisions by the courts of that state in such regard are cited. This is quite understandable, for New Jersey had a statute (Act of June 7, 1779) which rendered incompetent as a witness a person convicted of any of a number of specified crimes. In ascertaining what the law of New Jersey was in 1789 with respect to the impeachment of a witness by showing his prior conviction, the subsequent and present law of the state is helpful, not as in any wise controlling but in implying the grade of crimes capable of stigmatizing veracity. It will be observed that the crimes listed in the Act of 1779 (which worked a guilty person's incompetency as a witness) did not include crimes of lesser degree such as disorderly conduct or other minor breaches of the peace or crimes which are considered crimes largely because the redress for the offense is ordinarily obtained through criminal process, such as a charge of non-support. Nor do we find desertion listed in that statute. This discrimination as to the degree of the crime necessary to impeach credibility is confirmed by subsequent decisions of the courts of New Jersey. In keeping with the more liberal trend in most jurisdictions, the legislature of New Jersey in 1871 emancipated indicted defendants and made them competent to testify. Then, in 1874, an act was passed making any person convicted of a crime competent to testify in his own behalf but providing that the prior conviction could be shown to affect his credibility. While the word 'crime' as used in that statute was later construed to mean any crime (State v. Henson, 66 N.J.L. 601, 50, Atl. 468, 469), subsequent

decisions of New Jersey courts plainly indicate that the all-embrasive definition given to the word 'crime' in the case last above cited is subject to some restriction. For instance, a conviction in a summary proceeding for reckless driving has been held not to be a crime within the meaning of the Act of 1874, Huff v. C. W. Goddard Coal & Supply Co. et al., 106 N.J.L. 19, 21, 148 Atl. 175, 176 (N.J. Sup. Ct.); nor a conviction for driving an automobile while under the influence of intoxicating liquor, Thomas et al. v. Devine, 104 N.J.L. 361, 364, 140 Atl. 324, 325 (N.J. Ct. of Err. & App.); nor a conviction as a disorderly person, State v. Block, 119 N.J.L. 277, 282, 196 Atl. 225, 229 (N.J. Sup. Ct.).

It is our opinion that if the question here involved were raised in a competent court of New Jersey, the offense of desertion would not be deemed to be such as to effect the offender's credibility. In thus referring to the present law of New Jersey we do so not because it is of influence in the application of a federal criminal statute by a federal court sitting in that state, but because it is declaratory of the law of New Jersey which in the absence of a showing to the contrary may be presumed to have been the common law of New Jersey.

But in addition to what we believe the pertinent law of New Jersey to have been, the rule generally as applied by federal courts in trials under federal criminal statutes is that it is only a conviction of a felony or a misdemeanor amounting to crimen falsi which is admissible to impeach credibility. The crime of desertion falls within neither of these categories. It is not a felony (being specifically denominated a misdemeanor), nor is it a misdemeanor which amounts to crimen falsi. The law could hardly impute unworthiness

of belief to one of the parties to marital differences merely because of such differences. We therefore conclude that the learned trial judge did not err in excluding the evidence which the defendant proferred for the impeachment of the witness Leo DeLeone.

The judgment of the District Court is affirmed."

6. The petitioner deeming the foregoing proposition of law erroneous and an infringement of his legal right, to have the said Court below review and reverse the cause for error, thereupon, on the 20th day of January 1942 filed a petition for re-hearing and a brief in support of said petition (Record p. 36) in consequence of which on the sixth day of March 1942 said Court entered a document entitled "Order", in and by which said Court struck out that portion of the opinion quoted, mentioned and described in paragraph 5 hereof and in lieu thereof held, adjudicated and determined that,

"And now, to wit, March 6, 1942, the opinion filed in the above entitled matter for this court on January 6, 1942, is hereby amended by deleting therefrom the matter beginning with 'Finally, the appellant argues', etc., on page 5 of the printed opinion, and continuing to the end of the opinion, and by substituting in lieu thereof the following:

Finally, the appellant contends that the trial court erred in refusing him leave to impeach a witness for the prosecution by showing that the latter had been convicted of deserting his wife and children in Pennsylvania where that particular offense is denominated a misdemeanor. In this connection, the appellant argues that, as the offense of desertion was likewise a misdemeanor at common law in New Jersey, at the time of the adoption of that state's constitution on September 2,

1844, and, later, by state statute enacted in 1937, a conviction for the same character of misdemeanor which the state law thus denounces may be used in a trial in New Jersey to stigmatize the offender's credibility. In so contending, the appellant quite evidently assumes that this question of evidence, in the trial of a federal criminal case, is to be resolved by the law of the state wherein the trial is held. So far as the rule upon which the appellant relies resides in New Jersey law made or enacted since 1789, it is of no effect upon the rules of procedure or evidence in the trial of a federal criminal case. Long ago the Supreme Court said that 'no law of a state made since 1789 can affect the mode of proceeding or the rules of evidence in (federal) criminal cases'. United States v. Reid, 53, U. S. (12 How.) 361, 366. While the Reid case has since been considerably restricted or altered with the respect to the binding effect in federal criminal trials of the state law as it existed in 1789 the rule declared in the Reid case as hereinabove quoted has never been derogated in principle. In no event, therefore, did the learned trial court in the instant case err in declining to be bound by the rule of evidence which the appellant advanced on the basis of New Jersey law made since 1789.

As to the law of New Jersey as it existed in 1789, the appellant points us to no pertinent rule of that state with respect to the impeachment of a witness by showing his prior conviction of crime. In fact there was then no occasion for a ruling in such regard. Quite generally in 1789 convicted persons were incompetent as witnesses. Consequently the question of their credibility or the method of impeaching it did not arise in practice. But even if New Jersey had had such a rule of impeachment in 1789 a federal court sitting in that state would no longer be bound thereby in the trial of a

criminal case. It is in that particular that the effect of the Reid case has been changed by later decisions.

In Benson v. United States, 146 U. S. 325, 335, where the question of a witness' competency arose in a federal court sitting in Kansas, the Supreme Court proceeded to examine 'In the light of general authority and sound reason' the question of evidence there presented. (The further ruling of the Reid case as to the binding effect of state law as it existed in 1789 was later imputed by Logan v. United States, 144 U. S. 263, 303, to state law as it existed at the time of the particular state's admission to the Union after 1789). However the binding effect in a federal criminal trial of state law either as it existed in 1789 or upon a state's later admission to the Union, was not directly involved in the Benson case. There the appellant had sought to use the decision in the Reid case as a ruling that in a federal court a co-defendant is incompetent as a witness.

But the question whether state law as it existed in 1789 is any longer binding upon a federal court in the trial of a criminal case came squarely before the Supreme Court in Rosen v. United States 245, U. S. 467, 470-471, and was answered in the negative. In the Rosen case, the defendant's objection to a witness' competency because of a prior conviction for forgery would have been sustainable if the common law of New York, as it existed in 1789 still controlled, but the District Court overruled the objection and permitted the witness to testify, thus denying any effect in the federal trial to the New York common law of 1789. The Court of Appeals approved the action of the District Court and, on certiorari, the Supreme Court affirmed the lower courts. In so doing, the Supreme Court again

considered the question of competency 'in the light of general authority and sound reason' and, being satisfied 'that the legislation and the very great weight of judicial authority which have developed in support of this modern rule (as distinguished from the New York common law rule) especially as applied to the competency of witnesses convicted of crime, proceed upon sound principle', the Supreme Court further concluded, p. 471 'that the dead hand of the common law rule of 1789 should no longer be applied to such cases as we have here' (question of evidence in federal criminal cases).

The effect of the decision in the Rosen case was further interpreted by the Supreme Court in Funk v. United States, 290 U. S. 371, 379, where the court said 'With the conclusion that the controlling rule is that of the common law, the Benson case and the Rosen case do not conflict; but both cases reject the notion, which the two earlier ones (Reid case and Logan case) seem to accept, that the courts, in the face of greatly changed conditions, are still chained to ancient formulae and are powerless to declare and enforce modifications deemed to have been wrought in the common law itself by force of these changed conditions.' Then followed Wolfle v. United States, 291 U. S. 7, wherein the Supreme Court said, p. 12, that 'During the present term this Court has resolved conflicting views expressed in its earlier opinion by holding that the rules governing competence of witnesses in criminal trials in the federal courts are not necessarily restricted to those local rules in force at the time of the admission into the Union of the particular state (California in that case) where the trial takes place, but are governed by common law principles as interpreted and applied by the federal courts in the light of reason and experience.'

It may therefore be taken as the rule that in the trial of criminal cases federal courts are bound by such rules of procedure and evidence as Congress prescribes and such further rules as the federal courts have adopted or from time to time may adopt in the light of general authority and sound reason. So treating with the question raised in the instant case, we believe the rule with respect to impeachment for former conviction, as generally applied by federal courts in criminal cases, to be that it is only convictions for felony or misdemeanors amounting to crimen falsi which are admissible to impeach a witness' credibility The crime of desertion falls within neither of these categories. It is not a felony (being specifically denominated a misdemeanor), nor is it a misdemeanor which amounts to crimen falsi. The law would hardly impute unworthiness of belief to one of the parties to marital differences merely because of such differences. The fault in such regard might not even lie with the one sought to be impeached. We therefore conclude that the learned trial judge did not err in excluding the evidence which the defendant proferred for the impeachment of the witness Leo DeLeone.

The judgment of the District Court is affirmed" (Record p. 51).

B.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The basis of the petitioner's several complaints predicated on the facts aforesaid are as follows:

1. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to the

decisions of this Court and decisions of Circuit Courts of Appeal for other Circuits and the general law, holds and adjudges that impeachment of witnesses by reason of antecedent criminal acts or omissions can only be predicated on such criminal acts or omissions as are crimen falsi.

2. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to the decisions of this Court, the Circuit Courts of Appeal for other Circuits and the general law, holds and adjudges that the desertion of wife and children made a misdemeanor by statute and made punishable by fine and imprisonment does not constitute moral turpitude having the attribute to impeach the credibility of a witness who has been adjudged guilty of such offense.

3. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to decisions of this Court, the decisions of Circuit Courts of Appeal for other Circuits and the general law, holds and adjudges that at the time of trial of the present cause crimes denominated crimen falsi existed and afforded the sole basis of impeachment of witnesses by reason thereof.

4. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to the decisions of this Court, the decisions of Circuit Courts of Appeal for other Circuits and the general law, holds that the impeachment of credibility of witnesses is limited in so far as antecedent criminal acts or omissions on their part is concerned only to acts denominated crimen falsi and involving moral turpitude.

5. That the Circuit Court of Appeals for the Third Circuit, contrary to the decisions of this Court, holds and adjudges that a record of conviction in a criminal case does not show the culpability of the convict involved therein.

6. That the Circuit Court of Appeals for the Third Circuit, by the judgment under review, contrary to Section 1 of Article 4 of the Constitution of the United States, denies full faith and credit to the record of the Domestic Relations Court in Philadelphia, in the State of Pennsylvania disclosing the conviction of the Government's witness Leo DeLeone for the misdemeanor of desertion of his wife and children.

Wherefore, your petitioner respectfully prays:

That a writ of Certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Court of Appeals for the Third Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and all proceedings in the cause to the end that said cause may be reviewed and determined by this Court as provided by law, and that your petitioner may have such other and further relief as to this Court may seem proper and be in conformity with law.

And your petitioner will ever pray.

EDWARD MONTGOMERY,
Petitioner.
By JACOB WEINSTEIN,
Attorney for Petitioner.

MICHAEL SERODY, ESQ.,
Of Counsel.

United States of America,
Eastern District of Pennsylvania, ss:

Jacob Weinstein, being duly sworn according to law, deposes and says that he is Attorney for the above named Petitioner; that he prepared the foregoing Petition; and

that the allegations contained therein are true to the best of his knowledge, information and belief.

sgd. Jacob Weinstein
JACOB WEINSTEIN.

Sworn to and subscribed this 2nd day of April, 1942.

Mary B. Kasher (seal)
Notary Public
My commission expires
April 2, 1945